Supreme Court, U.S.
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THE UNITED STATES SUPREME COURT

OCTOBER 1994 TERM

MADELEINE O. ROBINSON,

Plaintiff, Appellant, Petitioner

v.

ROOSEVELT BENTON, et. al.,

Defendants, Appellees, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In retaliation-based employment discrimination matters, how is the period of time between the occurrence and the retaliation to be determined?
2. In retaliation-based employment discrimination matters, when does retaliation cease to be considered a possible motive for the discrimination?
3. In retaliation-based employment discrimination matters, must a plaintiff prove the existence of retaliatory animus in order to avoid summary judgment?

PARTIES

Plaintiff-Appellant-Petitioner

Madeleine O. Robinson

Defendants-Appellees-Respondents

Roosevelt Benton, Mary Batastini, Jintana Pond, Rose Antonelli, Lisa Benevides-Powers, Roberto Gonzalez, Donald Lopes, Mary Smith and Julia Steiny, in their capacity as members of the School Board of the City of Providence, Rhode Island; Arthur Zarrella, Superintendent of Schools for the City of Providence, Rhode Island; and Paul Vorro, Deputy Superintendent for Secondary Schools of the City of Providence, Rhode Island.

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STATEMENT OF JURISDICTION

This is an action alleging retaliation on the part of the defendants, members of the Providence, Rhode Island School Committee, the superintendent and the deputy superintendent, in denying the plaintiff her request to transfer to Classical High School and to chair the English Department at Classical High School. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq., specifically Sec. 2000e-2(a)(1) and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

The plaintiff unsuccessfully appealed the transfer and English Department Chair denials administratively. She then filed these retaliation charges with the EEOC. On September 30, 1992, the EEOC found no probable cause and issued a right to sue letter.

On December 29, 1992, the plaintiff filed a *pro se* complaint in the First Circuit District Court for the District of Rhode Island. She alleged violation of Title VII, based upon retaliation, for the Providence School Department's failure to transfer and promote her to the position of English Department

Chair at Classical High School. On February 17, 1994, the defendants filed their motion for summary judgment. Order and judgment were entered for the defense on June 23, 1994 and June 24, 1994, respectively.

On July 6, 1994 the Plaintiff entered her appeal as of right, according to all applicable Federal Rules of Appellate Procedure, to the United States Court of Appeals for the First Circuit. Jurisdiction of this Court was invoked pursuant to 28 U.S.C., sections 1331 and 1343(a) for the Sec. 1983 causes of action and for the causes of action under Title VII jurisdiction was provided pursuant to 28 U.S.C., sections 1331 and 1343 and 28 U.S.C. 2000e. On February 21, 1995, The Court of Appeals affirmed the judgment for substantially the reasons set forth in the June 1994 order and judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES

Civil Rights Act of 1964, Title VII,
42 U.S.C. Sec. 2000e et seq.

U.S. CONST., amend. I, IV, and XIV.

STATEMENT OF THE CASE

The plaintiff, Madeleine O. Robinson, graduated from Salve Regina University in 1957 with a Bachelors Degree in English, an independent major in Education, and a minor in Art. She began teaching at East High School in Denver, Colorado and within one year she became a department head. In 1964, while finishing her Masters studies at the University of Pennsylvania, Dr. Robinson obtained a position as department head at Sharon Hill High School. In 1967, she started teaching English at Mount Pleasant High School in the Providence, Rhode Island School System. One year later, she transferred within that school system to Classical High School. Due to her seniority, Dr. Robinson was granted a sabbatical in 1980 to finish her doctorate at the University of Rhode Island.

During her years at Classical High School, Dr. Robinson aggressively advocated the rights of her fellow teachers under their collective bargaining agreement. She filed numerous grievances concerning topics ranging from improper class rotation to sexual harassment. She received positive results from over ninety percent of her grievances. In 1977,

Dr. Robinson was elected Classical High School's union representative. In 1978, she was instrumental in the filing of the "Lesson Plan" law suit against the Providence School System. In March 1979 the court agreed with her position and found against the Providence School System.

In June 1979, Dr. Robinson was involuntarily transferred from Classical High School to Roger Williams Middle School. The defendants claim that she was involuntarily transferred due to a history of parent, student and teacher complaints. Robinson disputed, and continues to dispute, the validity and veracity of those complaints. Robinson subsequently filed a complaint with the EEOC, claiming the involuntary transfer was in retaliation to a prior complaint. The EEOC informed Robinson that no probable cause existed and issued her a right to sue.

Although Dr. Robinson had requested to be transferred back to Classical, she accepted a transfer to Central in 1980. Later that year, Robinson filed suit in the United States District Court for the District of Rhode Island, claiming that the involuntary transfer violated her rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000e et seq. and the

First and Fourteenth Amendments of the United States Constitution. The District Court found against Dr. Robinson and she appealed. On August 31, 1983 the United States Court of Appeals for the First Circuit affirmed the District Court's decision.

One year later, Dr. Robinson arrived at the top of the list to be transferred back to Classical High School as an art teacher. In 1987 her name should have come to the top of the transfer list for an English teaching position at Classical High School. It has now been ten years since she first arrived at the top of the transfer list and no transfer has occurred.

According to the collective bargaining agreement, transfers are supposed to be nondiscretionary and based on seniority. The defendants state that the transfer requests were denied in light of the prior complaints which resulted in the involuntary transfer. One of these complaints, written by Peter J. Davis, the Classical High School principal, discussed his displeasure with Dr. Robinson's continued use of the grievance process.

Joseph Almagno, however, provided a different reason for Dr. Robinson's transfer denial. Mr. Almagno was the

personnel director of the Providence School System when Dr. Robinson's name first came to the top of the transfer list. He later became Superintendent of Schools in 1986. Almagno has stated that the sole reason for denying Dr. Robinson's transfer to Classical was that she had lost her case concerning the involuntary transfer. In his deposition on December 16, 1993, he stated:

> A. "I received a notice that a vacancy existed at Classical High School and in accordance with the Collective Bargaining Agreement the transfer list was to be utilized in that particular vacancy as compared to some other section of the contract. It was clear that the transfer list was to be utilized. Dr. Robinson was the most senior person on the transfer list holding the proper certification for that position. Under normal conditions the transfer would have been enacted. Instead because of my knowledge of the history of Dr. Robinson's involuntary transfer from Classical, I took it upon myself to call Attorney Vincent Piccirilli to seek advice as to the appropriateness of enacting his transfer.
>
> Q. Was he still the attorney for the school department at the time?
>
> A. No, he wasn't but he made himself available pro bono, I might add to say something good about Vinny. Anyway, that conversation was of the nature, it was brief but of the nature, that as a result of previous involuntary transfer and affirmation of the right of the board to do that by the federal court, that Dr. Robinson quote "was never to return to Classical High School in any capacity end quote." The question I had

> for Vinny was, "Was her right to return to Classical limited in the area of English only seeing that she was going to switch disciplines, could she take the art position when she denied the right to return to Classical only in English?" And the answer was as I stated. On that basis, depending upon what position I was in, I would have either shared that with the superintendent, or if I was superintendent I would have shared it with the school board. In any event, the decision to deny was based on that information."

Almagno never said he relied on complaints. Almagno did admit that complaints concerning Dr. Robinson were kept in a separate file; however, he assured Dr. Robinson in 1984 that this file would be expunged.

Dr. Robinson was therefore forced to remain at Central High School. Between 1984 and 1990 she received a number of commendations for her teaching techniques. In addition, she convinced her principal of the importance of funding a school newspaper and magazine. In 1990, these publications received awards from the New England School Press Association. Throughout this time her name remained at the top of the list to be transferred to Classical High School, yet she was never transferred. Numerous other people, however, were transferred ahead of her.

In 1990, the position of English Department head at Classical High School became available. Dr. Robinson submitted an application and was deemed qualified to interview for the position. Although she was the only candidate with a doctorate in English, she was not awarded the position. The defendants once again asserted that the decision was based on her prior history, resulting in the aforementioned involuntary transfer. Anthony Mezzonatte, one of the three members of the selection committee, stated that the decision not to select Dr. Robinson was based on the answers she gave during her interview. In addition, Almagno claimed the reason for the denial was that Dr. Robinson lost her case involving the involuntary transfer.

In 1990, Dr. Robinson filed a grievance and exhausted all possible remedies within the Providence School System. In 1992, she filed a claim with the EEOC charging the defendants with retaliation against her for her lawsuit that finished August 31, 1983; she claimed that they retaliated against her by denying her transfer requests and denying her the English Chair position.

The EEOC contacted Robinson and discussed a possible settlement. Subsequently, the defendants submitted Robinson's personnel file to the EEOC. This file contained the supposedly expunged complaints, but all commendations were excluded. The EEOC found no probable cause and issued Robinson a right to sue. She filed suit in the United States District Court for the District of Rhode Island. The defendants moved for summary judgment and their motion was granted by the District Court. Dr. Robinson appealed that decision and, on February 21, 1995, the United States Court of Appeals for the First Circuit affirmed the decision of District Court.

ARGUMENT

I. IN RETALIATION-BASED EMPLOYMENT DISCRIMINATION MATTERS, THE PERIOD OF TIME BETWEEN THE OCCURRENCE AND THE RETALIATION SHOULD BE DETERMINED BY LOOKING TO THE END OF THE OCCURRENCE PROMPTING THE RETALIATION AND THE FIRST INSTANCE OF RETALIATION OCCURRING THEREAFTER.

The defendants, in their brief to the First Circuit Court of Appeals, stated it to be their position that over eleven years passed between Dr. Robinson's statutorily protected activity and their discriminatory action. In support of their position, they looked to Dr. Robinson's 1979 Charge of Discrimination as the starting point, and the 1990 transfer and English Department Chair denials as the end point. This analysis is without merit.

The defendants were well aware that any discriminatory actions by them during the earlier lawsuit might have affected their position in that lawsuit negatively. Therefore, they could not "safely" discriminate against Dr. Robinson until that case had been resolved, on August 31, 1983. The first instance of discrimination took place less than thirteen months later, in September 1984. This was the

defendants' first true opportunity to discriminate against Dr. Robinson subsequent to the disposition of her earlier lawsuit, on August 31, 1983.

From September 1984 until September 1990, there continued to be instances of discrimination. The defendants contend that Dr. Robinson made no mention of the 1984 discrimination at the District Court level, causing the issue to be permanently lost. These instances of discrimination were, however, included in the record below, in the form of Dr. Robinson's deposition. Therefore, the allegations of discrimination in 1984 should be considered part of the record below and, therefore, appropriately preserved for appellate purposes. See England v. Gebhardt, 112 U.S. 502, 5 S.Ct. 287 (1884).

The Petitioner urges this Court to establish a rule setting forth the way in which the period of time between the occurrence and the retaliation should be determined, suggesting that courts should look to the end of the occurrence prompting the retaliation as the starting point, and the first instance of retaliation as the end point.

II. IN RETALIATION-BASED EMPLOYMENT DISCRIMINATION MATTERS, RETALIATION SHOULD NOT CEASE TO BE CONSIDERED A POSSIBLE MOTIVE FOR THE DISCRIMINATION UNTIL WELL MORE THAN ONE YEAR HAS PASSED BETWEEN THE OCCURRENCE PROMPTING THE RETALIATION AND THE RETALIATION ITSELF.

A number of courts have considered the time element between the protected activity and the employment action in deciding whether there is a causal connection. In Morgan v. Massachusetts General Hospital, 712 F.Supp. 242, 255 (D.Mass. 1989), the court found that the plaintiff's discharge occurred nineteen months after he wrote a letter complaining of discriminatory treatment and thirty-three months after he wrote a newspaper article opposing his employer's sick time policies and concluded that "too much time elapsed between plaintiff's discharge and his purported opposition activity to allow a jury to infer from the timing that the discharge was retaliatory." Id. at 255.

In Oliver v. Digital Equip. Corp., 846 F.2d 103 (1st Cir. 1988), the court stated that a "showing of discharge soon after the employee engages in an activity specifically protected by [Title VII] is indirect proof of a causal connection between

the firing and the activity because it is strongly suggestive of retaliation." Id. at 110. However, the firing took place thirty-three months after the filing of the EEOC claim, negating any inference of retaliation, in the court's opinion.

In Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991), the court intimated that a nine month period between the filing of a complaint with the EEOC and the plaintiff's discharge "suggest[ed] the absence of a causal connection between the statutorily protected conduct and the adverse employment action." Id. at 828.

No clear line has been drawn by the courts. As a result, it is unclear exactly when retaliation ceases to be considered a possible motive for discriminatory treatment. On August 31, 1983, the First Circuit Court of Appeals affirmed the decision of the District Court and found against Dr. Robinson (in her earlier lawsuit). Less than thirteen months later, in September 1984, Dr. Robinson arrived at the top of the list to be transferred back to Classical High School as an art teacher. Despite the clarity of the collective bargaining agreement with regard to such matters, the defendants refused to transfer Dr. Robinson.

Admittedly, over one year had passed. However, this was the defendants' first true opportunity to discriminate against Dr. Robinson after she lost her lawsuit in 1983, a fact meriting consideration. Dr. Robinson has consistently been denied transfers and promotions ever since.

The Petitioner urges this Court to determine whether, given the facts of this case, too much time passed between the plaintiff's statutorily protected activity and the discriminatory activity and too establish a framework for determining how much time must pass before retaliation can no longer be considered a possible motive for employment discrimination.

III. IN RETALIATION-BASED EMPLOYMENT DISCRIMINATION MATTERS, A PLAINTIFF SHOULD NOT BE REQUIRED TO PROVE THE EXISTENCE OF RETALIATORY ANIMUS IN ORDER TO AVOID SUMMARY JUDGMENT.

The plaintiff contends that prima facie proof of employment discrimination and proof that the defendants' proffered reasons for the discrimination were pretextual should have resulted in the denial of the defendants' motion for summary judgment.

In St. Mary's Honor Center v. Hicks, ___ U.S.___, 113 S.Ct. 2742 (1993), this Court addressed a similar issue. Based on the Court's reasoning in Hicks, proof that the defendants intentionally retaliated against Dr. Robinson for exercising her statutorily protected rights, in addition to proof of pretext, would necessitate judgment as a matter of law for Dr. Robinson. Dr. Robinson, however, merely seeks a denial of the defendants' motion for summary judgment.

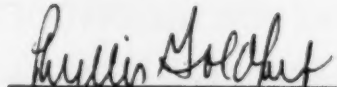
In its reasoning in Hicks, this Court stated, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that upon such rejection no additional proof of discrimination is required." Id. at 2749. This language was quoted by the Court of Appeals for the First Circuit in Hazel v. U.S. Postmaster General, 7 F.3d 1 (1st Cir.1993).

Magistrate Judge Lovegreen, however, granted the defendants' motion for summary judgment in District Court, stating, on page 12, "plaintiff must point to specific facts which infer discriminatory intent." See Appendix. The Court

of Appeals relied upon this reasoning in affirming the District Court's decision.

The plaintiff contends that the Court of Appeals erred. Therefore, by proving a prima facie case and by proving the defendants' proffered explanations to be pretextual, the defendants' motion for summary judgment should have been denied.

PETITIONER,
By her attorney,



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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1761

MADELEINE O. ROBINSON,

Plaintiff, Appellant,

v.

ROOSEVELT BENTON, ETC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine, Senior U.S. District Judge]

Before

Boudin, Circuit Judge,

Bownes, Senior Circuit Judge,

and Stahl, Circuit Judge.

David J. Barend, with whom Barend, Heartquist & Hurley was on brief, for appellant.

Patricia K. Rocha, with whom Adler, Pollock & Sheehan was on brief, for appellees.

February 21, 1995

Per Curiam. Having carefully reviewed the record in this case, along with the arguments contained in the parties' briefs, we are fully persuaded that this appeal presents no substantial question of law or fact. Consequently, we affirm the judgment below for substantially the reasons set forth in the Report and Recommendation of Magistrate Judge Lovegreen dated May 20, 1994 (adopted and approved by the district court on June 24, 1994, following de novo review).

Affirmed. See 1st Cir. R. 27.1.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MADELEINE O. ROBINSON

vs. C.A. NO. 92-0699-P

ROOSEVELT BENSON, ET AL.

REPORT AND RECOMMENDATION

Robert W. Lovegreen, United States Magistrate Judge

This is an action alleging gender discrimination and retaliation on the part of defendants, members of the Providence School Committee ("Committee"), the superintendent and the deputy superintendent, in denying plaintiff her request to transfer from a teaching position at Central High School ("Central") to one at Classical High School ("Classical") in Providence and to chair the English Department at Classical. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., specifically § 2000e-2(a)(1) and the First, Fourth, fifth and Fourteenth Amendments to the United States Constitution. Initially plaintiff also alleged age discrimination in violation of

the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., but at oral argument plaintiff stated she was no longer pressing any age discrimination charges. Defendants have filed a motion for summary judgment pursuant to F.R.Civ.P. 56(c). This matter has been referred to me for preliminary review, findings and recommend disposition. 28 U.S.C. § 636(b)(1)(B). Based upon the following analysis, I recommend defendants' motion for summary judgment be granted.

Facts

Plaintiff is a tenured English teacher in the Providence School System having taught there since 1967. Plaintiff taught English at Classical until June, 1979 when she involuntarily transferred from Classical to the Roger Williams Middle School due to a history of complaints from students, parents and administrators. As a result of that transfer, plaintiff pursued several avenues of relief including filing a charge of sex discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC") and the Rhode Island Commission for Human Rights ("RICHR").

Eventually suit was commenced in this Court against the Committee, and following a short trial, judgment was entered for the Committee. This judgment was affirmed by the First Circuit Court of Appeals. Robinson v. Jones, No. 82-1445, slip op. (1st Cir. August 31, 1983).

Plaintiff remained at Roger Williams Middle School for one semester and then was granted a paid sabbatical for one semester. Thereafter, plaintiff was transferred to Central where she stayed although placing her name on the transfer list for transfer to Classical. While at Central, plaintiff received support from the Central principal including congratulatory memoranda for plaintiff's work with the school newspaper and other student publications and projects. A second paid sabbatical was granted to plaintiff for the fall semester, 1988 in order for plaintiff to pursue her doctorate in English.

All appeared to be serene until the summer of 1990 when plaintiff requested transfer to Classical and also applied for the Classical English Department Chair. Plaintiff's name had risen to the top of the transfer list and she was desirous of returning to classical not only to teach English but to be the Chair of the English Department.

The superintendent denied plaintiff's request to transfer due to her prior stormy history at Classical and awarded the position to another female applicant. Plaintiff was interviewed for the Chair position by a three-member panel (2 females and 1 male), but defendants awarded the position to a male who was then an English teacher at Classical and had been for 11 years. In all, there were ten applicants, six males and four females. Plaintiff's administrative appeals were unsuccessful, and she filed a complaint with the EEOC alleging sex discrimination as to the denial of appointment to the Chair position and sex discrimination and retaliation as to the denial of her request to transfer to Classical. EEOC found no evidence to support plaintiff's charges and issued a right to sue letter. This complaint followed.

At oral argument, plaintiff stated she now alleges sex discrimination and retaliation as to the denial of her appointment to the Chair position in that a male, less qualified than plaintiff, was appointed and also alleges retaliation as the basis for denial of her transfer to Classical. Plaintiff's retaliation charges are based on two allegations: "(1) that the defendants did not allow the plaintiff to transfer to Classical

High School in 1990, and in earlier years, because the plaintiff had filed charges of discrimination against the defendants in 1979 and lost the court case based on those charges in 1983; (2) in 1990 the defendants denied the plaintiff a promotion to English Department Chair at Classical High School based on the same retaliatory motive." (Pltf.'s Mem. in Support of Opposition to Defs.' Mot. for S.J., p.1)

Discussion

When determining a motion for summary judgment, I must review the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. Mesnick v. General Elec. Co., 950 F.2d 816, 820 (1st Cir. 1991), cert. denied, 112 S.Ct. 2965 (1992); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c); see Goldman v. First Nat'l Bank of

Boston, 985 F.2d 1113, 1116 (1st Cir. 1993); Lawrence v. Northrop Corp., 980 F.2d 66, 68 (1st Cir. 1992).

Summary judgment is a procedure that involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver "an absence of evidence to support the nonmoving party's case." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party meets this burden, the onus falls upon the nonmoving party, who must oppose the motion by presenting facts that show that there is a "genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) (citing F.R.Civ.P 56(e)); see Goldman, 985 F.2d at 1116; Lawrence, 980 F.2d at 68; Garside, 895 F.2d at 48 ("[A] 'genuine issue' exists if there is 'sufficient evidence supporting this claimed factual dispute' to require a choice between 'the parties' differing versions of the truth at trial.'" (quoting Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976)). To oppose the motion successfully, the nonmoving party "may not rest upon mere allegation or denials of his pleading." Anderson, 477 U.S. at

356. Moreover, the evidence presented by the nonmoving party "'cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial.'" Mesnick, 950 F.2d at 822 (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Indeed, "[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Thus, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting "enough competent evidence to enable a finding favorable to the nonmoving party." Goldman, 985 F.2d at 1116 (citing Anderson, 477 U.S. at 249).

I. The Gender Discrimination Claim

Where plaintiff, as here, has no direct evidence of gender bias, the burden-shifting requirements established in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), must be met. These requirements are: (1) plaintiff must show a prima facie case of discrimination; (2) the defendant then must articulate a legitimate, nondiscriminatory basis for its adverse employment decision and, if accomplished; (3) the plaintiff then must show that defendant's reason is actually a pretext for discrimination. See Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991).

A. The Prima Facie Case

Plaintiff must initially make a prima facie case of gender discrimination. McDonnell Douglas, supra. This burden is not onerous and requires only that plaintiff give rise to an inference of gender discrimination. Mesnick, 950 F.2d at 823. Here plaintiff has demonstrated that she is within a protected class (females); that she is qualified for the position as Chair of the Classical English Department (she was a tenured English teacher possessing a doctorate in English at the time); and the position was offered to someone not as qualified and outside the protected class (a male without a

similar doctorate). Plaintiff has shown a prima facie case of gender bias.

B. Legitimate, Nondiscriminatory Basis

Defendants' have provided a legitimate, nondiscriminatory reason for not offering plaintiff the English Department Chair. In an affidavit from one of the panel members interviewing applicants for this position for recommendation to the defendants, Thomas Mezzanotte, principal of Classical, stated that after all interviews were completed and reviews of all applicants' histories in the Providence school system and all submitted materials by applicants were digested, the successful candidate was chosen based on merit alone. Specifically Mr. Mezzanotte explained the reason for not selecting plaintiff by stating: "The committee recommended to the Superintendent that [the successful applicant] be appointed [to] the English Department Chair as he was the best applicant. [He} was well respected in the school system, had successfully taught English at Classical for eleven years, and we believed he had the requisite ability to lead the English Department and would have the respect of the

teachers in that department. Moreover, [he] had innovative and creative ideas concerning the future of the English Department, based in part on his involvement with the Essential School Program at Hope High School where he had taught, which involved an innovative philosophy to bring education to students." (Mezzanotte affidavit at 2). Mr. Mezzanotte also added that during the interviewing process, he was not aware of the specifics of the 1979 complaints filed by plaintiff against the Committee. Clearly then, defendants have met their burden to articulate a legitimate, nondiscriminatory reason for selecting the successful applicant over plaintiff for the English Department Chair.

C. The Defendants' Reason is a Pretext

Plaintiff must now show that the reason offered by these defendants is but a pretext for gender discrimination. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

> In assessing pretext, a court's "focus must be on the perception of the decision-maker," that is, whether the employer believed its stated reason to be credible. It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must "elucidate

> specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive: age discrimination." (citations omitted.)

Mesnick v. General Elec. Co., 950 F.2d at 824 (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)).

The plaintiff may meet this burden through: circumstantial evidence, including statistical evidence; showing disparate treatment of the protected class by the employer; comments by decision-makers adverse to the protected class; incidents of differential treatment in the workplace; and deployment of males. See Mesnick, 950 F.2d at 824. The important point here is that the court should look at the entire proof offered by plaintiff and not isolated pieces. Id. Once step three is reached (pretext), the "plaintiff must offer some minimally sufficient evidence, direct or indirect, both of pretext and of the employer's discriminatory animus to prevail in the face of a properly drawn Rule 56 motion." Id. at 825.

All plaintiff offers in an attempt to meet her pretext burden is evidence that the superintendent stated in a

deposition that the court case commenced in 1979 which the plaintiff lost was considered in the decision-making process in selecting the new Chair. Plaintiff does not dispute the fact she was involuntarily transferred out of Classical in 1979, filed discrimination charges as a result and lost her lawsuit based thereon, and it certainly is not discriminatory to consider a prior involuntary transfer out of Classical due to complaints from all constituencies. This consideration is not alleged to, and on its face is not, linked in any way to plaintiff's sex. Therefore, plaintiff's pretext evidence is woefully inadequate and falls far short of the mark showing sexual discrimination. Plaintiff has not offered any statistical evidence, any adverse comments from the selection committee, any differential treatment in the workplace or evidence of consistent promotion of males over similarly qualified females. At best plaintiff offers an unfocused argument that the defendants did not consider her current abilities, job performance and changes in her style of teaching. Even if plaintiff's argument is correct, this is not evidence that defendants chose another applicant based on gender bias. The reason defendants chose another applicant may not have been the soundest or the wisest

personnel decision, time will tell, but "[c]ourts may not sit as super personnel departments, assessing the merits - or even the rationality - of employer's non-discriminatory business decisions." Mesnick, 950 F.2d at 825.

At this point, the court must consider the ultimate question, whether as to all evidence in the record, "a rational factfinder could conclude that [gender bias] was a determining factor in the employer's decision." Id. In fairness to plaintiff and reviewing all the evidence, I am of the opinion that gender bias could not be considered any basis, never mind the determining factor, in defendants' decision to reject plaintiff's application for Chair of the Classical English Department. Plaintiff has failed to meet her pretext burden, and thus, defendants should be granted summary judgment on her claim of sexual discrimination.

II. The Retaliation Claim

In addition to alleging that defendants discriminated against her by reason of her gender, plaintiff also alleges that defendants retaliated against her because of her earlier (1979) charges filed with EEOC and RICHR and the resulting

lawsuit. Specifically, plaintiff charges that defendants retaliated against her in the decision not to transfer her to Classical although she was listed at the top of the transfer list and in the denial of her application for English Department Chair.

Employers are prohibited from discriminating against any employee because he or she has made a charge pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., 42 U.S.C. § 2000e-3(a). In retaliation cases, absent direct evidence of discrimination, the burden-shifting analysis established in McDonnell Douglas applies to the order of proof. Petitti v. N.E. Tel. & Tel. Co., 909 F.2d 28, 31 (1st Cir. 1990). First the plaintiff must prove a prima facie case. Then the burden shifts to defendants to articulate a nondiscriminatory basis for the employment decision. Then plaintiff has the burden of persuading the court that the offered reasons were a pretext for discrimination. Id. This becomes an issue of intent and plaintiff must point to specific facts which infer discriminatory intent. Id. at 31-32; Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 895 (1st Cir. 1988).

In order to show a prima facie claim of retaliation, plaintiff must show:

> [f]irst, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions disadvantaging persons engaged in protected activities; and third, a causal connection between the first two elements that is a retaliatory motive playing a part in the adverse employment actions.

Petitti, 909 F.2d at 33 (quoting Watts v. University of Delaware, 622 F.2d 47 (3rd Cir. 1980)).

Here, plaintiff has demonstrated that in 1979 she filed charges against defendants with the EEOC and RICHR and a lawsuit, all of which was known to defendants, and that thereafter, in 1990, she was denied a transfer to Classical and denied the Classical English Department Chair. Where plaintiff stumbles is in showing a causal connection between the charges and the employment actions taken approximately 11 years later. During this 11 year period, plaintiff taught in the Providence school system, was granted two paid sabbaticals and pursued her English doctorate, was granted two paid sabbaticals and pursued her English doctorate, was allowed to work with student publications receiving commendations therefor and, by her own deposition

testimony, received substantial support in her teaching efforts from her principal and superintendent.

Courts have considered the time element between the protected activity and the employment action in deciding whether there is a causal connection. In Morgan v. Massachusetts General Hospital, 712 F.Supp. 242 (D. Mass 1989), the court found plaintiff's discharge occurred 19 months after he wrote a letter complaining of discriminatory treatment and 33 months after he wrote a newspaper article opposing his employer's sick time policies and concluded "too much time elapsed between plaintiff's discharge and his purported opposition activity to allow a jury to infer from the timing that the discharge was retaliatory." Id. at 255.

In Oliver v. Digital Equip. Corp., 846 F.2d 103 (1st Cir. 1988), the court stated a "showing of discharge soon after the employee engages in an activity specifically protected by [Title VII] is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation." 846 F.2d at 110. In that case, the firing occurred 33 months after the filing of the EEOC claim. This long delay negated any inference of retaliation. See also Mesnick v.

General Elec. Co., 950 F.2d 816, 828 (9 months between EEOC complaint and discharge suggests absence of retaliation).

In Lewis v. Gillette Co., 1993 WL 291771 (D. Mass.), affirmed, 1994 WL 141102 (1st Cir. 1994), the employee was discharged at least 29 months following his testimony in favor of a co-employee at a hearing in a class action suit brought against Gillette alleging racial discrimination. The court stated "the at least 29-month distance in time between Lewis' testimony at the arbitration hearing and his discharge is too great to permit a reasonable fact finder to conclude there was a causal connection between the two events." Id. at *8.

Likewise, the 11 year period between plaintiff's protected conduct and the alleged retaliatory actions belies any inference of retaliatory animus in this case. Nevertheless plaintiff argues that she has evidence of retaliatory animus in that the superintendent, during his deposition, stated that his reason to deny the transfer was based on the lost court case. (Almagno depos. at p. 9). However, plaintiff misconstrues this testimony. The superintendent stated that he interpreted

the court's 1983 decision to mean that plaintiff was not to return to Classical and this interpretation was reinforced following a conference with the school committee's attorney. The superintendent did not state that plaintiff was denied transfer because she filed the lawsuit.

Plaintiff also refers to deposition testimony of Thomas Mezzanotte, one of the panel members not recommending plaintiff for the Chair position. He testified as to the interviewing process in that all applicants were asked the same pre-selected questions and the responses were rated by the selection committee. The applicant's experience and education were not rated. (Mezzanotte depos. at 3, 4, 6 & 7). Plaintiff attempts to show an inconsistency between this testimony and an affidavit provided by Mezzanotte in support of this motion. In the affidavit, Mezzanotte stated that his committee reviewed the applicants' history in the Providence school system, the materials submitted by each applicant and considered the ability of each applicant to be a leader in the English Department and to work with those teachers. I fail to see any inconsistency and certainly none that would give rise to an inference of retaliatory animus on the part of these defendants.

Mezzanotte is not a defendant and did not make the final decision as to the occupant of the English Department Chair. His animus is therefore irrelevant, but there is no evidence of retaliation. Mezzanotte stated in his affidavit he was unaware of the specifics of the earlier charges filed by plaintiff.

As previously stated, the court must look to all the evidence and not isolated pieces. Mesnick, 950 F.2d at 824. Quite clearly, plaintiff has failed to show any evidence that the decisions not to transfer her to Classical and not to appoint her to the English Department Chair were based on retaliatory animus. Simply put, plaintiff has failed to show a prima facie case for retaliation.

Conclusion

For the reasons stated, I recommend defendants' motion for summary judgment be granted.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt.[1] Failure to file specific

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[1] Rule 32, Local Rules of Court; F.R.Civ.P. 72(b).

objections in a timely manner constitutes a waiver of the right to review by the district court.[2]

Robert W. Lovegreen
United States Magistrate Judge
May 20, 1994

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[2] United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

Supreme Court, U.S.
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No. 94-1911

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MADELINE O. ROBINSON,
Petitioner

v.

ROOSEVELT BENTON, ET. AL.,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the First Circuit (the "First Circuit") err in affirming the United States District Court for the District of Rhode Island's (the "District Court") entry of summary judgment on the Petitioner's claim of discriminatory retaliation due to the absence of any causal connection between the protected activity and adverse employment action?

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STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-3(a) provides:

> (a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner's *Pro Se* Complaint alleged violations of 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964 as amended ("Title VII"), and violations of the First, Fifth and Fourteenth Amendments to the United States Constitution, claiming sex discrimination and retaliation based upon the Respondents' failure to transfer her to Classical High School ("Classical") and appoint her English Department Chair at Classical in the Fall of 1990. In response to Respondents' Motion for Summary Judgment, Petitioner waived her claim of sex discrimination with respect to the transfer claim. Judgment entered in favor of the Respondents as a result of their Motion for Summary Judgment on the grounds that there were no genuine issues as to any material fact and, as a matter of law, Petitioner had failed to establish a *prima facie* case of sex discrimination or retaliation. Thereafter,

Petitioner appealed the judgment to the First Circuit on the claim of retaliation only.

The First Circuit, in a *per curiam* one paragraph opinion, affirmed the judgment below on the grounds that Petitioner failed to prove a *prima facie* case of retaliation by failing to show a causal connection between the protected activity and the adverse employment action.

Many of the statements of fact in Petitioner's Statement of the Case are irrelevant with respect to the issues raised herein and, therefore, are not individually addressed by Respondents. The facts relevant to the issues on appeal are not in dispute and as discussed further herein, demonstrate that the First Circuit did not err in affirming the District Court's grant of summary judgment.

Petitioner is a tenured English teacher in the Providence, Rhode Island, public schools, having taught there since 1967. In June, 1979 as a result of numerous complaints from students, parents and the administration at

Classical, where she was teaching, Petitioner was involuntarily transferred to the Roger Williams Middle School pursuant to the Collective Bargaining Agreement by and between the School Board of the City of Providence (the "Board") and the Providence Teachers Union Local 958, American Federation of Teachers AFL-CIO (the "Union") of which Petitioner is a member.

Shortly thereafter, Petitioner filed a grievance with the Union, and in July, 1979 filed a Charge of Discrimination with the Rhode Island Commission for Human Rights ("RICHR") and the Equal Employment Opportunity Commission ("EEOC"), claiming that the transfer was in retaliation for a September, 1978 Charge of Discrimination she previously filed with the same agencies. In February, 1980, the EEOC notified the Petitioner that it found no probable cause and issued a right to sue letter. Petitioner then filed suit in the District Court in September, 1980, claiming that the involuntary transfer violated her right under

Title VII and the First and Fourteenth Amendments to the United States Constitution. In April, 1982 the District Court found against Petitioner on all her claims.

Petitioner subsequently appealed the April, 1992 adverse decision to the First Circuit. On August 31, 1983, the First Circuit issued its decision, affirming the District Court's finding that the transfer was neither the result of discrimination nor in violation of the United States Constitution.

After being transferred to Roger Williams Middle School in 1979, Petitioner made a request for a sabbatical to pursue her doctorate degree. This request was granted and Petitioner was given a paid sabbatical for the second semester of the school year, February to June, 1980. In the Fall of 1980, Petitioner, having been placed on a transfer list at her request, was transferred to Central High School pursuant to the Collective Bargaining Agreement. Petitioner continued to maintain her name on the transfer list for

transfer to Classical; however, her name had not come to the top of the list at that time. Petitioner continued to teach at Central and by her own admission received very good support from her principal. During Petitioner's tenure at Central, she was also given numerous approvals and praise for extracurricular seminars, additional instructional materials and materials for the school newspaper. In the Fall of 1988, Petitioner was granted a second paid sabbatical to continue pursuit of her doctorate in English.

During the Summer of 1990, Petitioner requested transfer from Central to Classical and also made application for English Department Chair. Although Petitioner's name was now at the top of the transfer list, the Superintendent exercised his discretion pursuant to the Collective Bargaining Agreement and refused to transfer Petitioner in light of her prior history at Classical resulting in the involuntary transfer. The transfer to Classical was given to a

female teacher, the next name on the transfer list. The Department Chair was granted to a male teacher.

Petitioner then filed a Charge of Discrimination with the EEOC and the RICHR for her failure to be transferred to Classical and be appointed English Department Chair. Petitioner claimed, *inter alia*, that the transfer and Department Chair denials were in retaliation for the prior charge of discrimination filed in 1979. On September 30, 1992, the EEOC issued its determination that the evidence obtained during its investigation did not establish a violation of Title VII.

As discussed previously herein, Petitioner thereafter filed a *Pro Se* Complaint which resulted in the District Court's grant of summary judgment on the grounds that Petitioner failed to establish *prima facie* cases of sexual discrimination and retaliation, subsequently affirmed by the First Circuit. In this Petition, Petitioner seeks review of the First Circuit decision. A review of relevant authorities and

the facts of this case, reveals that the First Circuit did not err and that certiorari should be denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

In Retaliation Based Employment Discrimination Claims, Plaintiff Must Establish A *Prima Facie* Case, Including A Causal Connection Between The Protected Activity And The Adverse Employment Action.

Petitioner suggests that this Court establish a rule identifying the period of time between the protected employment activity and the adverse employment action, suggesting that courts should look to the end of the protected activity and the first instance of retaliation as the end point. Based on such a rule, Petitioner suggests that the lower court erred in affirming the grant of summary judgment. Such suggestion is totally without merit.

A. Petitioner's Argument Concerning Retaliation Was Not Raised In The Lower Court.

Petitioner suggests that the time period to be examined for purposes of the retaliation claim is the period between August 31, 1983 (at which time the First Circuit affirmed the Disctrict Court's ruling that Petitioner's 1979 Charge of Discrimination was without merit) and September, 1984 (when Petitioner claims she was denied a transfer to another school), thereby establishing a causal connection between the protected activity and the adverse employment action. However, Petitioner's Complaint only alleges retaliation resulting from conduct of the Respondents in the Fall, 1990, namely, the denial of Petitioner's transfer and English Department Chair requests. Nowhere in the District Court action did Petitioner plead a claim based upon action by Respondents in 1984. Petitioner only alleged wrongdoing

based upon conduct occurring in 1990.[1]

It is established that Federal Courts of Appeal will not consider issues not raised or passed on by the lower court. J & S Construction Co., Inc. v. Travelers Indemnity Company, 520 F.2d 809 (1st Cir. 1975). In Singleton v. Wulff, 428 U.S. 106 (1976), this Court elaborated on this general rule:

> [T]his is 'essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, [the opposing party] would, or

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[1] Petitioner's suggestion that the requirement that an issue be raised at the lower court level in order to be preserved for appellate review is satisfied by reference to Petitioner's deposition testimony is totally unfounded. The deposition testimony mentioning action in 1984 was never made a part of Petitioner's Complaint nor did Petitioner ever raise a claim based on action by Respondents in 1984.

> could, offer ..., but this is only because [it] has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, [the opposing party] should have the opportunity to present whatever legal arguments he may have ... 428 U.S. at 120, *quoting* Hormel v. Helvering, 312 U.S. 552, 556 (1941).

Petitioner's failure to allege any retaliatory action by Respondents in 1984 is a bar to review in this Court.

B. Petitioner's New Retaliation Claim Is Time Barred Due To The Lack of Required Administrative And Court Filings.

More importantly, however, even if a claim of retaliatory action by Respondent in 1984 was made in the District Court litigation, it would be time barred as no administrative or court filings were timely made. In Jensen v. Frank, 912 F.2d 517, 520 (1st Cir. 1990), the First Circuit ruled that failure to file the required administrative filing was a bar to an action under Title VII: "Title VII requires

exhaustion of administrative remedies as a condition precedent to suit in federal district court. Jensen at 520, *citing* Brown v. General Services Admin., 425 U.S. 820, 832 (1976). Lastly, even assuming, *arguendo*, the filing of a timely claim, the requisite causal connection would be lacking as a matter of law in light of the 13 month period (August, 1983 to September, 1984), as discussed further herein.[2]

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[2] Moreover, assuming, *arguendo*, Petitioner had timely filed the required administrative filings and asserted a retaliation claim in a civil action based upon conduct which occurred in 1984, accepting Petitioner's logic, the period of time for retaliation claim purposes would be computed from April, 1982, when the District Court entered judgment against Petitioner and not the affirmance of the judgment by the First Circuit. Inasmuch as the First Circuit review is an appellate review of the record established in the District Court, without opportunity to present evidence of a defendant's subsequent actions which might affect his position in the pending litigation as suggested by Petitioner, accepting Petitioner's logic, Respondents could "safely" discriminate once the record was closed at the District Court level. Therefore, the period April, 1982 to September, 1984, the date of the first transfer denial, as a matter of law, would fail to meet the causal connection element of a retaliation claim.

C. **There Is No Causal Connection Between The Protected Activity And The Adverse Employment Action.**

The First Circuit affirmed the District Court's finding that Petitioner failed to establish the requisite causal connection between the protected activity, her 1979 Charge of Discrimination, and the adverse employment action taken approximately 11 years later, the transfer and English Department Chair denials. Petitioner correctly identified District Court and First Circuit opinions which discussed the elements of a retaliation claim, all of which correctly and consistently state that in order to prevail, the moving party must show (1) protected participation or opposition under Title VII known by the alleged retaliator, (2) an employment action or actions disadvantaging persons engaged in protected activities, and (3) a causal connection between the first two elements that is a retaliatory motive playing a part in the adverse employment actions.

The cases cited by Petitioner involve holdings as a matter of law of the absence of the requisite causal connection based upon a 19 month, 33 month, and 9 month period between the protected activity and the adverse employment action. See, Morgan v. Massachusetts General Hospital, 712 F. Supp. 242, 255 (D.Mass. 1989), Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st Cir. 1988), and Mesnick v. General Elec. Co., 950 F.2d 816 (1st Cir. 1991), respectively. Likewise, the First Circuit, in affirming the District Court's entry of summary judgment, affirmed the holding that the 11 year period did not meet the requirement of a causal connection between the protected activity and the adverse employment action.

Moreover, the absence of a retaliatory motive evidenced by the period of duration between the protected activity and the adverse action was underscored by the favorable actions taken by the Respondents during the 11 year period, including two paid sabbaticals in order for

Petitioner to pursue her English doctorate, approval for student publications and commendations therefor, and by Petitioner's own deposition testimony, substantial support in her teaching efforts from her principal and students. As the First Circuit stated, the 11 year period between Petitioner's protected conduct and the alleged retaliatory action, belies any inference of retaliatory animus in this case. Moreover, the actions of the Respondents are totally at odds with any retaliatory motive.

Petitioner urges this Court to establish a rule setting forth the way in which the period of time between the protected activity and the retaliation should be determined and identifying a clear line as to what period of time constitutes a causal connection between the two. These suggested rules are neither necessary nor appropriate to a claim of retaliation and applied to the facts of this case, have no bearing on the issue of liability. The statute and case law are clear: It is unlawful for an employer to discriminate

against any employee because he ". . . has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Calculation of the period of time between the protected activity and the adverse employment action will turn upon the facts of a particular case, as will the requirement of a causal connection. Did the moving party file a charge of discrimination or testify at a proceeding at a charge of discrimination or participate in an investigation? If so, the period of time for a retaliation claim begins with such activity. Moreover, is there a causal connection that there is a retaliatory motive between the activity and the adverse employment action?

In the facts herein, the First Circuit correctly affirmed the District Court's ruling of the absence of causal connection based upon 1) the 11 year period between the filing of the charge of discrimination and the adverse employment action in 1990, as alleged in Petitioner's

Complaint, and 2) the favorable action taken by the Respondents with respect to Petitioner during that same period. As a matter of law, Petitioner failed to establish a causal connection that is a retaliatory motive resulting in the transfer and English Department Chair denials in 1990, due to the filing of the Charge of Discrimination in 1979.[3]

CONCLUSION

It is clear from the facts and law cited herein that the decision of the First Circuit is not in conflict with any other

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[3] In Section III of Petitioner's Writ for Certiorari, Petitioner claims that the First Circuit erred in affirming the lower court's grant of summary judgment, suggesting that once there is a showing of a *prima facie* case and rejection of a defendant's proffered reasons for a legitimate business purpose, the trier of fact must then decide the ultimate fact of intentional discrimination and the motion for summary judgment should have been denied. Such argument is inapposite. In the facts at bar, by failing to prove a *prima facie* case of retaliation, the Court did not reach the issue of whether the Respondents articulated a legitimate nondiscriminatory basis for the adverse employment decision. It is only when both prongs are met that the fact finder is then allowed to determine whether the action was the result of intentional discrimination.

Circuit. Moreover, the decision of the First Circuit is not in error, the Petition for Writ of Certiorari should be denied and the judgment of the First Circuit affirmed.

Respectfully submitted,

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